S. V. WANTRUP
WALLACE HARDIN

IBLA 70-102 Decided April 13, 1972

Appeal from a decision by Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, affirming dismissal of protest against consummation of private exchange S 941.

Affirmed.

Private Exchanges: Protests--Private Exchanges: Public Interest

A protest against a proposed private exchange is properly dismissed when the proposed exchange complies with the statutory requirements that the exchange benefit the public interest and that the value of the selected lands not exceed the value of the offered lands, and where the allegations by the protestant do not provide a basis for sustaining the protest.

Color or Claim of Title: Generally--Color or Claim of Title: Description of Land--Color or Claim of Title: Good Faith

Where the deed to the color of title claimant specifically excludes the land claimed, the claimant has not established color of title. In those circumstances, the claimant relying on such a deed fails to demonstrate a justifiable reason for believing he had good title and therefore does not satisfy the good faith test of the Color of Title Act, as amended, 43 U.S.C. §§ 1068, 1068a, 1068b (1970).

Color or Claim of Title: Generally--Words and Phrases

"Color of title." Land occupied by one purportedly claiming under color of title, but who does not establish that the land in issue was conveyed to him by an instrument which on its face purported to convey the land in issue, is not thereby removed from the category of "vacant" public lands.

APPEARANCES: S. V. Wantrup, pro se; Harold J. Thorsen for the appellee.

OPINION BY MR. HENRIQUES

S. V. Wantrup has appealed a decision dated October 13, 1969, in which the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision by the Bureau's Sacramento land office dismissing Wantrup's protest against consummation of private exchange S-941. Pursuant to section 8, Taylor Grazing Act, as amended, 43 U.S.C. § 315g (1970), Wallace Hardin had applied to select four isolated parcels of public domain land containing 128.53 acres in lieu of a single 120-acre tract of privately-owned land. 1/

The lands in question are situated in northeastern Napa county, California, in the rough uplands between Lake Berryessa and Chiles Valley. Three of the selected parcels, each containing 40 acres, lie wholly within a ranch owned by the applicant Hardin; the fourth parcel is a lot containing 8.53 acres, contiguous to ranch lands of of the applicant and the protestant, with the larger portion of the lot being fenced into the Wantrup land.

The protest of Wantrup, dismissed by the decisions below, consisted essentially of his claim to ownership of part of the said lot and his contention that the exchange is not in the public interest as the value of the offered land does not equal that of the selected, as required by statute. In support of his claim of ownership to the lot, Wantrup argued that the payment of taxes by himself and his predecessors in interest since 1901, existence of valuable improvements, and good faith adverse possession vest in him a claim to the "larger portion" of the lot under the Color of Title Act, 43 U.S.C. § 1068 (1970). He suggests that the lot is not proper for exchange, being neither "vacant" nor "surveyed" as required by the Taylor Grazing Act, supra, and that the south line of T. 9 N., R. 5 W., M.D.M., is imaginary. The present appeal reiterates these contentions.

1/ Description of the offered lands: T. 8 N., R. 4 W., M.D.M., sec. 9: NE 1/4 SW 1/4, N 1/2 SE 1/4.

Description of the selected lands: T. 8 N., R. 4 W., M.D.M., sec. 8: NW 1/4 NW 1/4, SW 1/4 NE 1/4, NE 1/4 SE 1/4; T. 8 N., R. 5 W., sec. 2, lot 1.

Looking first at the charge that the exchange is not in the public interest, we find that the record shows the four parcels of selected land are each isolated tracts separated from other public domain lands. The three 40-acre parcels lie completely within fee lands of the applicant. The 8.53-acre lot is contiguous to fee lands of both the applicant and the protestant. None of these selected lands is reported as having such mineral, timber, recreational, or other values as would compel its retention in federal ownership. 43 CFR § 2430.2 (1972). Indeed, each of the four parcels has been classified as suitable for disposal by private exchange, because the overall land management in the area will be benefited by transfer of title to the surrounding or adjoining fee title owner. The offered land has water in a permanent stream and is surrounded on three sides by a tract of public land encompassing more than 10,000 acres. Acquisition of the offered land by the United States appears to be in the public interest because it will enhance management of and access to public land through consolidation and removal of this small inholding tract, as well as by obtaining a source of permanent water useful to the bureau's programs. Considering the reported character of the lands involved and the apparent usefulness to the government's land management program, we find that the public interest will be benefited by consummation of this exchange. The contentions of the appellant to the contrary are without merit.

The charge that the appraised values given to the lands involved in the exchange are incorrect is not supported by any substantive evidence. The record indicates that similar appraisal standards and techniques were applied to both the offered and the selected lands by the bureau's appraisers. The results of the appraisals show a fair market value for the offered lands to be $17,400 and for the selected lands $17,280. Thus the exchange clearly meets the statutory requirement that value of the selected land not exceed value of the offered land. Consummation of the exchange will not be detrimental to the government's interest.

The contention that the greater part of lot 1, section 2 has been held by Wantrup in good faith adverse possession under the Color of Title Act, supra, is neither relevant nor supported by the record. Appellant has not filed a claim under the Color of Title Act. It is well established that a claim or color of title must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title. Peterson v. Weber County, 99 Ut. 281, 103 P.2d 652, 655 (1939);

Minnie E. Wharton, et al., 4 IBLA 287 (1972); see Karvonen v. Dyer, 261 F.2d 671, 674 (9th Cir. 1958); and Henry D. Warbasse, Eugenia W. Warbasse, A-39383 (August 19, 1965). We look at the deed dated May 27, 1966, which conveyed title to Wantrup for the ranch lands contiguous to this lot. Following the metes and bounds description of the lands in the deed is this summary statement:

> "Containing 394.27 acres of land, more or less, and being a portion of the Locallomi Rancho and Sectional lands adjoining on the southwest thereof, excepting therefrom, however, the portion thereof lying south of the south line of township 9 N., R. 5 W., and also excepting therefrom any portion thereof lying within the boundaries of lot 2, in section 35 in said township 9 N., R. 5 W., Mount Diablo Base and Meridian."

As lot 1, section 2, T. 8 N., R. 5 W. is south of the south line of T. 9 N., it was explicitly excluded from the area included in the deed to Wantrup. The color of title claim must be denied where the deed under which the subject tract is claimed specifically excludes the tract from the area conveyed to the claimant. Cf. Nora Beatrice Kelley Howerton, 71 I.D. 429 (1964). In the instant case, since the appellant has failed to demonstrate a justifiable reason for believing he had good title, he does not meet the good faith requirement; this requirement is an essential ingredient of a valid color of title claim. Minnie E. Wharton et al., supra. His use and occupancy of the land was therefore not sanctioned by law. Cf. Atherton v. Fowler, 96 U.S. 513 (1877). Land so occupied is not thereby removed from the category of "vacant" public lands. See United States v. John C. Brown, 57 I.D. 169 (1940). Where an occupancy is assertedly under color of title, and there is no color of title, the occupancy does not vitiate the "vacant" character of the land. Cf. Whitten et al. v. Read, 53 I.D. 447, 452 (1928).

The contention that the said lot 1 is not "vacant" or "surveyed" is disproved by an examination of the records in the Sacramento land office of the Bureau of Land Management. These records depict lot 1, section 2 on the plat of survey for township 8 N., R. 5 W., M.D.M., approved April 21, 1876, and further show that no patent has ever been issued to transfer title to the lot from the United States. The records likewise show that the plat of survey for township 9 N., R. 5 W., M.D.M., was approved June 18, 1872, establishing at that time the south boundary line of the township.

Upon consideration of the entire record in the case at bar, it is concluded that consummation of the exchange will benefit the public interest, the value of the selected land is less than value of the offered land, and that none of the assertions of the appellant afford any basis for sustaining his protest. Cf. Glenera Sheehan Hunter, et al. A-27627 (Sept. 29, 1956).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

Douglas E. Henriques, Member

We concur:

Frederick Fishman, Member

Joseph W. Goss, Member

Newton Frishberg, Chairman

DISSENTING OPINION BY MR. RITVO

The majority opinion dismisses Wantrup's protest on the grounds that the proposed exchange complies with the statutory requirements, the value of the selected lands does not exceed the value of the offered lands, and the allegations of the protestant do not provide a basis for sustaining his protest. 1/

While I do not disagree with most of the general propositions relied upon by the majority, I do not believe that they are dispositive of Wantrup's protest.

The majority disposes of the case by satisfying itself that the legal requirement for an exchange has been met. While such a conclusion is, of course, important it does not prohibit the consideration of other aspects of the proposed action.

An application for a private exchange creates no rights in the applicant and its allowance remains within the discretionary authority of the Secretary. Jack H. Stockstill et ux., and Vernon C. Mager et ux., 1 IBLA 278; Clyde H. Ault, A-27125 (January 26, 1955).

The question, then, as I see it, is whether in the circumstances of the case the private exchange should be approved as to the 8.53 acres in lot 1, sec. 2. It is my conclusion that Wantrup has demonstrated that he and his predecessors have occupied their share of lot 1, had it under fence, and paid taxes on it for so long that he should not be deprived of an opportunity to acquire that portion of it from the United States.

The majority opinion recites briefly the history of the land in dispute. A fuller exposition is revealing.

The exchange offers a block of 120 acres of privately owned land in exchange for 128.53 acres of public land. The selected public land consists of 3 forty acre subdivisions lying within the same section and entirely surrounded by the privately owned lands of Hardin, the applicant.

1/ It also concludes that Wantrup does not have a "color of title" claim to the portion of lot 1, section 2. I believe it is premature to determine at this time whether Wantrup has a claim which must be recognized under the Color of Title Act. He has not filed a claim under that act and the disposition I would make rests upon the Secretary's discretionary authority without regard to whether Wantrup has a valid color of title.

The rest of the selected land consists of a triangular tract of 8.53 acres situated some 2 miles northwest of the other selected tracts. It is completely surrounded by privately owned lands. A fence divides it into two portions of about 6 and 2.5 acres, respectively. The larger portion forms the southeast corner of Wantrup's ranch while the smaller portion forms a corner of the Hardin ranch.

It appears that at some time prior to 1901 an ancestor of Hardin held title to a large parcel of land which included the tract in contention. The southern boundary of the original land ran southeast-northwest along the boundary of the Catacula Rancho. In 1901, a substantial portion of the original Hardin property was conveyed by Rebecca F. Hardin to J. R. L. Hardin. The southern boundary of the conveyed land was described as running along the northeastern boundary of the Catacula ranch to a fence and then along the fence north 26 degrees east 86.50 chains. The same parcel with the identical description was conveyed from J. R. L. Hardin and wife to their daughter Francis M. Hardin on August 20, 1906. It was then conveyed on January 10, 1920, under the same description to Thomas E. Young et ux. In May 1956, the Youngs in turn conveyed the same property to Edward J. Estreito and Florence Estreito, his wife. This deed recited the same description as the prior deeds, but added the exception set out in the majority opinion. The description and exception were repeated in the deed, dated May 27, 1966, conveying the tract to Wantrup.

The other portion of the original Hardin property has apparently passed to Wallace Hardin, the applicant for the private exchange. In his "answer to [Wantrup's] appeal" to the Secretary, Hardin states that the deed to his property includes "all of sec. 1, T. 8 N., R. 5 W., lying north of the Catacula Rancho line." The fence, which divides lot 1 into the portions in Wantrup's ranch and that of Hardin's, was in existence in 1901 and has remained there ever since as the boundary between the two parcels.

In the same document, Hardin agrees that Wantrup's predecessors paid taxes on a portion of lot 1 since 1901 and adds that "the Hardins have paid part of these taxes as well as protestants, and for an even longer period of years." In his answer to Wantrup's appeal to the Director, Hardin asserted that no fences in the area have been changed for many years.

In other words all of lot 1 had been included in a large tract of land held by a common predecessor. In 1901 the large tract was divided into two separate ones along a fence running northerly from the Catacula ranch boundary, which remained common to both new tracts. The fence divided the 8.53 acres in lot 1 into two portions, the larger of which, about 6 acres, was in the parcel that passed to Wantrup.

From 1901 on, the fence dividing the two ranches (and the lot 1) remained in existence unchanged. At least from 1907, which is as far back as the records go, Wantrup's predecessors paid taxes on the same acreage, including the larger part of lot 1. The county assessor informed Wantrup that the old assessor's parcel maps as well as the current ones show the acreage assessed to Wantrup's ranch unchanged since 1907, and that there has been no change in how the parcel is delineated on these maps.

Wantrup asserts that when he purchased the property in 1966 the title company furnished him maps showing the surveyed boundaries, including the boundary between the Hardin and Wantrup ranches. He was also supplied with maps of the property as it appeared in the county tax rolls, showing identical boundaries. The number of purchased acres as indicated by the tax rolls and the title company included the larger portion of lot 1. He compared the maps and acreage with the actual fenced boundaries and found them consistent.

We have then a situation in which for more than 70 years a small tract of public land has been an integral of a large ranch and included within its fences. For 70 years it has been part of a division of the original tract, without change in boundaries, fences, or taxation. When Wantrup acquired it, there was nothing (but for the exception in the deed) in the assessor's maps, title company report or maps, or physical condition of the land to apprise him that a 6 acre triangle in the southeastern corner of a 394 acre tract was still public land.

At the same time, the 2 1/2 acre remainder of lot 1 was included within the adjoining Hardin ranch. Apparently the records, taxes and usage of the Hardin ranch encompassed its share of lot 1. While there is no indication of when Hardin discovered that his portion of lot 1 was public land, it is apparent that Wantrup did not know of the difficulty until Hardin told him of it.

Hardin then in an attempt to acquire title to his portion of lot 1 asked for all of it in his selection of public land. The majority decision awards him all of what he has asked for.

Considering the fact that both Hardin and Wantrup derived their titles from a common source, that they and their predecessors both used their portions of lot 1 for over 70 years, maintained fences dividing the lot, paid taxes, and acquired their portions in good faith, I would not dispose of lot 1 in this exchange. Since the Secretary has discretionary authority to approve or disapprove of a private exchange, I would remove lot 1 from the selected lands. Hardin could then choose to complete the exchange on that basis, refuse to do so, or ask for other available land to replace lot 1. See Israel Hunsaker, Utah 012441 (December 9, 1957). Lot 1 could then be offered for disposition under the Isolated Tract Act, 43 U.S.C. sec. 1171 (1970), all else being regular.

Martin Ritvo, Member

We concur:

Joan B. Thompson, Member

Anne Poindexter Lewis, Member